IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 345 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASHWANT ALIAS YASHWANT SHAMJI KADAM

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 345 of 2001

MR RAJESH M AGRAWAL for Appellants

MR HL JANI APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 05/11/2004

ORAL JUDGEMENT

1. This Appeal is preferred by the appellants under

Section 374(2) of the Code of Criminal Procedure against the judgment and order dated 21st of March 2001, delivered by learned Additional Sessions Judge, Court No.8, Ahmedabad City, where in a Sessions Case No. 325 of 2000, both the appellants were convicted by learned Trial Judge for the offence proved against the appellants under Sections 397 read with Section 120(B) of the Indian Penal Code and sentencing them for rigorous imprisonment of 7 years. Appellant No.1 was also convicted for the offence under Section 25(1) of the Arms Act and was sentenced to undergo 3 years rigorous imprisonment and to pay fine of Rs. 5,000/- in default to undergo rigorous imprisonment for one month. Appellant No.2 was also convicted for the offence punishable under Section 135(1) of the Bombay Police Act and was sentenced to undergo rigorous imprisonment for one and half months and fine of Rs. 500/- in default to undergo 15 days rigorous imprisonment.

2. In all 8 accused came to be tried by learned Trial Judge in Sessions Case No. 325 of 2000. Original Accused Nos. 3 to 8 came to be acquitted while present appellants - original accused Nos. 1 and 2 were convicted as aforesaid.

3. As per the prosecution case, the incident in question occurred on 10th of December, 1999. Victim complainant Harshadbhai Baldevbhai Patel was doing business of financing in the City of Ahmedabad at Galaxy Complex, Surbhi Hotel, Naroda. He had two employees along with him. One Jiggar Arvindbhai Patel and the other Nileshbhai Panchal. One Atulbhai Sakarchand Patel was working in the office of the complainant as Manager. As per routine, complainant was coming to his Office at 10.00 a.m. and was closing at 7.00 p.m. On the day of the incident, he as usual came to his office at about 10.00 a.m. Thereafter, at about 1.30 p.m. five unknown persons plunged in his office. His above said two employees and one of his friend Gajrajsinh Raghunathsinh Solanki were present. At that time, Manager was not present. All the five persons had worn pants and shirts. Out of those five persons, there were revolvers with three persons wrapped in hand kerchief and other two had knives. All the five persons as soon as they forcibly entered in the office, started giving abuses to complainant. Three persons separately aimed and kept revolvers at the temples of complainant, Gajrajsinh Raghunathsinh Solanki and Dinesh Panchal. Out of the other two persons, one person kept knife on the stomach of complainant. The fifth person also aimed knife against Jiggar Arvindbhai Patel. Out of five persons,

one person said that complainant had 10 lacs rupees and that he belonged to Dawood Gang and enquired about where the monies were kept. Three persons started beating complainant with fist. Complainant stated that the money is kept in the drawer of the table and that he should not be beaten. Thereafter, all the five persons dragged these four persons to inner room and were made to sit and others opened the drawer of the table and took out amount of Rs. 1,70,000/- lying in the drawer of the table kept in one Wallet. Complainant and other three persons had ornaments on their bodies and those ornaments were robbed by those five persons. In the meanwhile Manager Atulbhai Sakarchand Patel, who had been to Bank for brining amount of Rs. 30,000/- came down there, and those five persons also robbed Rs.30,000/- from Atulbhai Patel. Thereafter, those five dacoits dragged complainant and party in the bathroom and bathroom was closed. Thereafter, complainant and party started shouting from ventilation of the bathroom. The dacoits thereafter ran away from the office, and soon thereafter complainant and other four persons also came out of the bathroom. They noticed that outside the office, out of five dacoits, one showed revolver to one jeep driver and made him to stop. All the five dacoits thereafter boarded in the said jeep. Complainant and party shouted and therefore the crowd was gathered. All persons including complainant ran after them. In the road ahead, there was railway crossing of Naroda area. Since the train was to pass through, the said railway crossing was closed and, therefore, the jeep in which the dacoits were there, was stopped, and all the five dacoits got down from the jeep there, and out of five dacoits, three of them ran towards Noblenagar while two of them ran towards Chhiloda. The complainant and other persons gathered there, ran after two persons, who have attempted to escape towards Chhiloda. The said two dacoits were apprehended by the crowd and was handed over to the Police. Complainant informed Sardarnagar Police Station and his complaint was recorded by J.K. Vacchani, the then Senior P.I. of Sardarnagar Police Station. The said complaint given by the complainant was registered at Sardarnagar Police Station. The investigation was handed over to Jayantilal Karmanbhai Vachhani. In the meanwhile, as informed by PSO of Sardarnagar Police Station to Balwantsinh Dalpatsinh Rana, the then PSI of Kubernagar Police Station that near Galaxy Cinema at Naroda, loot has been committed and, therefore, Balwantsinh Dalpatsinh Rana reached near the office of complainant, where he was informed that the dacoits after committing loot, have absconded towards Naroda Railway Crossing in a jeep. Therefore, Balwantsinh Dalpatsinh Rana also reached at Naroda Railway Crossing, where he

found that on the other side of Naroda Railway Crossing towards Gujarat Agro Industries, two persons were lying on the road in injured condition. From the persons around, it was known by Balwantsinh Dalpatsinh Rana that the crowd of people had beaten these two persons. One country revolver was lying near one dacoit. In the meantime, Police van came there. Therefore, the two dacoits, who were in injured condition, were sent to Civil Hospital along with Head Constable Babulal and other persons in a mobile van. Thereafter, the Investigating Officer Mr. J.K.Vachhani reached near Naroda Crossing and on inquiring it was found that out of those two persons apprehended by the crowd, one was named as Surendrakumar Krishanlal Chaudhry, while other was named as Jashwant Samaji, who are appellants in this Appeal.

4. After investigation and arresting the accused, charge-sheet came to be filed by the Investigating Officer in the Trial Court. Appellant No.1 came to be arrested on 14th of December, 1999 and appellant No.2 came to be arrested on 12th of December, 1999 after they are discharged from the hospital.

5. Since the case was triable by the Court of Sessions, the case was committed by the learned Metropolitan Magistrate to the Court of Sessions.

6. Against all the accused, learned Additional Sessions Judge, Ahmedabad City, Court No.8, framed charge on 16.11.2000 at Exh. 11. All the accused including present appellants denied the charges and, therefore, prosecution examined as many as 23 witnesses and produced on record necessary documents like complaint, discovery panchnama, arrest panchnama etc. Before noting the contentions of learned counsels of the parties, for the purpose of appreciation, it is necessary to go through carefully the evidence recorded by learned Trial Judge.

6.1 PW-1 Harshadbhai Baldevbhai Patel, Exh.25 complainant while PW-2 Exh. 39 Gajrajsinh Raghunathsinh Solanki; PW-3 Exh.40 Atul Sakarchand Patel; PW-4 Exh. 41 Jiggar Arvindbhai Patel are the witnesses, who are victims in this incident. All of them stated in their depositions that while they were sitting in the Office of Complainant, as above stated, five unknown persons, who are dacoits, committed dacoity on the day of incident. All these four persons have stated that out of five dacoits, three dacoits had revolvers in their hands while other two dacoits were laced with knives. Complainant Harshadbhai Baldevbhai Patel stated that five dacoits

demanded money from them and they were made to sit in inner room. He identified accsued appellant No.1 and accused appellant No.2 in the court and stated that other three persons were not present in the court. He identified appellant No.1 to be a person who aimed revolver at his temple and identified appellant No.2 who aimed knife at his stomach. He stated that the persons who committed dacoity in his office had worn pants and shirts and was about 25 to 30 years of age. He identified muddamal revolver, which was found near railway crossing, Naroda near appellant No.1. He gave deposition in support of his complaint. He also stated that his friend Gajrajsinh as well as his two other employees were robbed by the dacoits. He has been cross-examined in detail. An attempt has been made to bring about and to show that the exact word which the complainant narrated in the complaint were not reproduced in his deposition and, therefore, there were contradictions. He was cross-examined about whether PW-3 Atul Sakarchand Patel and PW-4 Jigger Arvindbhai Patel were his employees, and for that, in cross-examination, register kept according to law, was got produced. It was also alleged against the complainant in cross-examination that he was headstrong person of that area and was known as bobi boss, which complainant denied.

6.2 PW-2 Exh. 39 Gajrajsinh Raghunathsinh Solanki also stated that while he was sitting in the office of the Complainant and his two employees i.e. Nilesh and Jiggar were present, five dacoits forcibly entered in the Office and they had worn pants and shirts and were around 25 to 30 years of age. One of them straightaway aimed revolver at the temple of the complainant and said that he was the person of Dawood and company and demanded the amount of Rs. 10 lacs. They were robbed out all the ornaments put on their body, and after pushing them, they were taken into the inner room. The dacoits had also beaten them with fists and kick. Three golden rings and one necklace worn by him were snatched by the dacoits. They also took out an amount of Rs.3,500/- from his pocket and snatched a mobile phone. Thereafter, from the drawer of the table of the complainant they took out some cash and they were confined in the bathroom and thereafter those five dacoits ran away from the office. According to this witness, thereafter they came out of the bathroom and saw that the five dacoits were absconding in a jeep and, therefore, they chased the jeep through vehicles which were available at that time. Witness stated that on account of railway crossing of Naroda being closed, jeep was stopped and out of five dacoits, three ran towards Noblenagar while two ran

towards Himatnagar. Crowd of persons apprehended two persons who ran towards Himatnagar. When out of those two persons, one person fired his revolver in the air, even then, they were caught by the crowd. In the meanwhile, Police reached there and those two persons were handed over to Police. This witness also identified appellants No. 1 and 2 in the court and stated that the person who aimed revolver to him could not be identified by him, but the persons, who took part in the dacoity and apprehended by the crowd, were identified by the witness as appellants No. 1 and 2. He has been cross-examined in detail but there appears no contradictions with his police statement.

6.3 PW-3 Exh. 40 Atul Sakarchand Patel deposed that he had been to Naroda Nagarik Bank for bringing Rs. 30,000/- and he got three bundles of notes of denomination of Rs.100/-. After getting money from the bank, he came to the Office of the Complainant Harshadbhai. He went inside the office and as soon as he entered, somebody caught hold of him from behind. He noticed two persons holding knives. He was taken to the inner room. There he saw three persons, each having revolver in their hands. He noticed that in the inner room, the Complainant Harshadbhai, Gajrajsinh Solanki, Nileshbhai and Jiggarbhai were made to sit and Harshadbhai was under the threat of firing because one person had aimed revolver against him and was demanding money and was saying that you have Rs.10 lacs and was enquiring about where the monies were kept, and they were beaten by kicks and fists. The dacoits robbed Rs. 30,000/- which he brought from the Bank and they also robbed the ornaments which he had worn like rings, necklace, wrist watch, etc. and they were made to go in a bathroom and they were confined in the bathroom. They shouted from the ventilation and therefore all the five dacoits ran away. On opening the door of bathroom, complainant and other persons according to this witness, came out of the office and saw that the dacoits were running away in a jeep and, therefore, all of them chased the jeep in the vehicles which were available with them. On account of Naroda Railway Crossing being closed, jeep came to be stopped and five dacoits got down and started running. Three of them ran towards Noblenagar while two of them ran towards Himatnagar. The crowd of people gathered and ran towards two persons who ran towards Himatnagar - Chhiloda. This witness also identified appellants No.1 and 2 and stated that appellant No.1 had revolver in his hand while appellant No.2 had knife. The witness also stated that they are the persons, who were apprehended at Naroda Railway Crossing. He identified

the muddamal shown to him, which was robbed from him. He was cross-examined in detail especially on the issue that what was there to show that on that day witness Harshadbhai had amount of Rs. 1,70,000/- with him and whether any documentary evidence was there to denote that on that day this witness obtained Rs. 30,000/- from the Bank. The witness denied all the allegations made against him. No contradiction is brought about in cross-examination in respect of his police statement.

6.4 PW-4 Exh. 41 Jiggar Arvindbhai Patel deposed that on the day of the incident while complainant Harshadbhai, his friend Gajrajsinh, Nilesh and himself were present at the office of complainant, five dacoits entered in the office. Out of 5 dacoits, there were revolvers in the hands of three dacoits while two were holding knives. Out of them, one aimed revolver on the temple of Harshadbhai and other threatened by attaching knives on the stomach of Harshadbhai. They were speaking abuses and were demanding the amount of Rs. 10 lacs. He stated that what was robbed from Harshadbhai he could not say, but his Timex make wrist watch with black dial was robbed by these dacoits and thereafter they were taken to bathroom. After dacoits ran away from the office, they came out of the bathroom and chased the dacoits, who were running away in a jeep. The jeep came to halt near the Naroda Railway Crossing and out of five persons, two persons attempted to abscond towards Chhiloda and were apprehended by public and they were beaten by the crowd. Thereafter, police came to the spot and these two persons were handed over to the Police. He sufficiently identified accused appellant No.1 and accused appellant No.2 to the extent that appellant No.1 was aiming revolver towards complainant Harshadbhai and appellant No.2 threatened with knife. He also has been cross-examined by the defence. He stated in the cross-examination that bathroom was locked from outside and from the window they shouted and, therefore, the dacoits ran away. He apprehended the accused and was handed over to Police by him. He also has been cross-examined about whether the complainant was doing business of gambling and though this witness was helping Harshadbhai in his gambling business, to which this witness denied. He denied that on account of insistence of Harshadbhai, he deposed falsely before the Court. No contradiction whatsoever is brought about by the defence in the cross-examination, so far as the police statement of this witness is concerned.

6.5 PW-5 Nikhilbhai Ranchhodbhai Patel, Exh.43, stated that he resides near Galaxy Cinema and doing

business in his house. On the day of incident at about 1.30 p.m. while he was on his counter of business place, he noticed five persons coming out of the office of Harshadbhai. Out of those five persons, three had revolvers in their hands and thereafter Harshadbhai and other persons also came out from the office. He inquired that what had happened and came to know that dacoity was committed in the office of Harshadbhai. He went to his office and got his scooter and went to Himatnagar road. The railway crossing of Naroda was closed and when the crossing was opened for the traffic, he found that two persons lying on the road and crowd of 100 to 150 persons. He identified before the Court that appellant No.1 and appellant No.2 to be the persons lying there and he also identified these two persons to be the persons who were coming out of the office of Harshadbhai on the day of the incident. For the fact stated by this witness before Police about whether appellant fired revolver in the crowd, APP asked permission of the Court to cross-examine the witness and the same was granted, and in his cross-examination by the prosecution, he denied that he saw that out of those two persons, one fired revolver in the air. In cross-examination of the defence, a theory is put that were hutments near the road of Naroda Railway crossing, and those hutmen were fighting amongst themselves, and due to this fighting, hutmen were injured. He had been asked that how he could remember the exact date of the incident. He admitted that in his police statement description of appellants No. 1 and 2 were not given. He also admitted that before the incident he never saw any of the appellants.

6.6 PW-6 Exh. 44 Manojkumar Nanumal Sindhi, is panch of panchnama Exh.45, and he stated that on 10th of December, 1999, he was called in the office of the complainant and made panchnama there. From there they went to Himatnagar Highway and from there they went to Naroda Railway Crossing. Near the Gujarat Agro Industries found one revolver and there were four cartridges which were fired. He and other panchas signed the panchnama. He has been cross-examined and stated that which Police Constable had been to call him was not known to him. He signed the panchnama prepared by the Police near Gujarat Agro Industries and after signing the same he went away.

6.7 PW-7 Exh.46 Rameshbhai Gulabbhai Sindhi is a panch of panchnama at Exh. 47 by which the clothes of the accused were seized by the Police. He has supported the panchnama at Exh.47.

6.8 PW-8 Rameshkumar Ramlalit Thakore is panch of discovery panchnama at Exh.50. In his deposition at Exh. 49, he stated that on 15th of December, 1999, he was called by the Police at 9.00 a.m. at Sardarnagar Police Station. There were police personnel and one more person, who was sitting in a bed. Police informed him that he was called as a panch in a loot case. The person who had committed loot had a plaster in the right leg and had bandages on his left leg, and his name was Yashwantbhai. The police personnel asked Yashwantbhai to inform panchas that where the muddamal was kept. The appellant No.1 Yashwantbhai stated that he be carried to a place which he would show where the muddamal was kept. Both the panchas, according to this witness, thereafter signed the panchnama. This witness identified appellant No.1 in the court. Thereafter carrying appellant No.1, second panch and police personnel started in a jeep and came near Gujarat Agro Industries. Reaching near the Gujarat Agro, appellant No.1 stated that there was a heap of garbage and he throw muddamal in the heap of garbage. There was a babul tree nearby. One Police Constable went there and found one plastic bag. The police man confirmed from appellant No.1 that whether the said plastic bag contained muddamal to which appellant No.1 confirmed. On opening the said bag, two golden rings, one necklace were found. Thereafter, one goldsmith was called by the Police and weighed the ornaments found from the place. The witness stated that thereafter he had signed both the panchnamas. This witness identified ornaments found from the Gujarat Agro Industries before the Court. He has been cross-examined in detail. He admitted that the place where muddamal was found, there was a high way and constant traffic movements on the said highway. There were shops and residential houses nearby. He denied that he knew complainant Harshadbhai. He denied that he did not go with the Police to recover muddamal. He denied that the goldsmith was called and ornaments were weighed. He denied that he deposed because he was relative of the complainant and only that Police Inspector Vachhani obtained his signature because he was known to Police Inspector Vachhani. Some details of panchnama is asked in cross examination.

6.9 PW-9 Exh. 52 Tilakdas Mirchumal Soni is a witness, who was called by the Police for weighing ornaments found in the heap of garbage. He stated that he weighed a chain of 13 grams, the other chain weighing 78 grams, one necklace weighing 23 grams and gold ring weighing 4 grams and other gold ring weighing 17 grams. He stated that he tested the metal and was found that two ornaments were of gold. In his cross-examination, he was

asked about Exh. 51, which is a document prepared by the Police in respect of weight of the ornaments. He stated in the cross-examination that when he went to the Police Station there were 4 to 5 police officers, and in his presence, he executed writing Exh. 51. He denied that at the instance of complainant and PI Vachhani, he gave false evidence.

6.10 PW-10 Exh. 53 Rameshbhai Hiralal Sindhi is panch of panchnama at Exh. 54 in respect of a jeep used by the accused, but this witness did not support panchnama at Exh. 54 in any respect.

6.11 PW-11 Exh. 55 Uddhav Bhagvandas Harjani is panch of panchnama by which the clothes of the accused were seized by the Police. He stated that he was called by the Police at Sardarnagar Police Station and accused were there. He stated that there were blood stains on the clothes worn by the accused. His clothes were changed and were wrapped in a paper. He identified the clothes before the court but stated that the person whose clothes were seized could not be identified by him.

6.12 PW-12 Exh. Exh. 56 Gordhandas Vaghumal Aswani, is a witness did not support the prosecution case, perhaps he was cited as witness because he stated before the Police that one of the accused had purchased knife from him. This witness is not important for this Appeal.

6.13 PW-13 Arvindji Jivanji Thakore, Exh. 57 is examined by the prosecution as owner of Jeep bearing Regn. No. GJ 2-K 3520, and it was the prosecution case that one Amratji Vajajihad hired this jeep, in which accused had travelled from Kalol to Ahmedabad. The witness did not support the prosecution case, but so far this appeal is concerned, this witness is also not important.

6.14 PW-14 Amratji Manaji Thakore, Exh. 58 is also a witness in respect of a jeep alleged to have been used by the accused, did not support the prosecution case.

6.15 PW-15 Laxmanji Manaji Thakore, Exh. 59 is a witness and brother of original accused No.8 was examined by the prosecution to prove the fact that one Ranajitsinh Vaghela had been to accused No.8, who is acquitted by the Trial Court. Though the witness did not support the prosecution case, at the same time, this witness is not important for this Appeal.

6.16 PW-16 Exh.60 Sumanchandra Hiralal Shah is Manager

of Uttam Guest House at Kalol. As per the prosecution case, some accused stayed at Uttam Guest House before the incident. This witness did not support the prosecution case nor is important for this Appeal. Likewise, the other Manager of Uttam Guest House, Kalol PW-17 Exh. 16 Rameshchandra Gordhandas Jani is also not material for this Appeal.

6.17 PW-18 Exh. 63 Mahendrabhai Pratapji Thakore, is an important witness though he has turned hostile to the prosecution, and prosecution sought permission to examine him in cross. The witness was gate-man at relevant time of Naroda Railway Crossing. In fact, it appears that he was examined for the fact that at about 1.45 p.m. some persons got down from jeep on account of railway crossing being closed and attempted to ran away, but that fact has not been supported by him in his deposition. He stated that on 10th of December 1999 he closed the crossing and after locking the doors he was watching the train. At that time, there was some commotion, somebody insisted to open the gates of the crossings, but he did not open it. He has been cross-examined, in which he stated that after closing the gates of the crossing and locking the gates he went to give the keys and after the train passed through he opened the crossing gates.

6.18 PW-19 Exh. 68 Babubhai Shakarabhai Desai, who was the then Police Constable of Sardarnagar Police Station, deposed that on 10th of December, 1999 while along with Police Constable Krushnakant Harisinh, Police Sub-Inspector Mr. B.D. Rana, he was present at Kubernagar Police Station, and at about 02.00 p.m. PSI Rana instructed them that a dacoity is committed in Galaxy Complex, Opp: Galaxi Cinema, they have to reach there immediately. Therefore, he along with Police Constable Krushnakant Harisinh reached Galaxy Complex where PSI B.D. Rana was present. Crowd was gathered there which informed them that five unknown persons committed dacoity in Hardik Finance and have gone towards Naroda Railway Crossing. Therefore, all the three and other persons from the public chased them towards Naroda Railway Crossing. This witness and Police Constable Krushnakant started on scooter while Mr. Rana, PSI, also started on other scooter. When they reached near Gujarat Agro, they found that two persons were lying in injured condition and one revolver was found lying there. Police escort was arranged there. In the meantime, a mobile van from Sardarnagar Police Station came there and two persons lying in injured condition were shifted to hospital in said mobile van. On inquiring, one stated his name as Yashwant Samji Kadam (appellant No.1) and

other stated his name as Surendrakumar Krishanlal Chaudhry (appellant No.2). They also gave the names of other persons, who were with them. The names of other persons were Jahon Desoza, Roki and Badshah. This witness identified appellants No. 1 and 2 before the Court to be the persons lying on the day of the incident before the Gujarat Agro Industries. In his cross-examination, he stated that the place where they reached, some fighting had taken place and some persons were injured. The persons who were injured were sent to hospital, except that, he did not see anything. He did not see any Doctor of Civil Hospital in his presence started treatment of the injured persons. He stated that he did not know complainant Harshadbhai but Harshadbhai with other two persons were present where those two injured were lying. He knew Harshadbhai only as complainant. B.D. Rana did not seize the revolver at the time when the injured were shifted to the hospital. Since the police escort was arranged at that time, revolver was lying on that place only. He did not see the incident. He only heard from the crowd about dacoity had committed. He denied that the person to whom he identified in the court were not taken by him to the hospital. He denied that there was fighting amongst the hutmen staying nearby and appellants were injured in that fighting and thereafter the police shifted them to the hospital. He denied that Police felt that they would be made liable in this incident and, therefore, the injured were sent to the hospital. He denied that B.D. Rana obtained revolver in the presence of him from Harshadbhai. He also denied that what revolver was seized from Harshadbhai and that was without licence. He denied that he stated false deposition.

6.19 PW-20 Exh. 69 Dilip Eknath Patil, was the then Unarmed Police Constable of Sardarnagar Police Station and he stated that on 10.12.1999 he was serving with Mobile van of Sardarnagar Police Station, and at about 14.20 hours, mobile van received message from control room to go to Gujarat Agro Industries and to meet mobile van of Naroda Police Station. Therefore, taking the van, this witness along with Police Constable Maganbhai Mohanbhai and Gunavantbhai Rudhabhai reached near Gujarat Agro. When they reached near Gujarat Agro, they found that two persons were lying and they were in injured and bleeding condition. Witness stated that he found PSI B.D. Rana and persons from Surveillance Squad. There was crowd of public as well. PSI Rana told them that these two persons were injured, be shifted by them to hospital. Therefore, they along with Surveillance squad persons shifted two injured to Civil Hospital. His

statement was recorded. On enquiry, it was found that name of one person was Yashwant Samji Kadam (appellant No.1) and the name of other person was Surendrakumar Krishanlal Chaudhary (appellant No.2). The witness identified appellant No.1 but could not identify appellant No.2 in the court, but identified some other accused. In his cross-examination he stated that he saw accused first time in the court. He denied that did not go to the place.

6.20 PW-21 Exh. 70 Maheshbhai Vashrambhai Rabari also was the then Police Constable of Sardarnagar Police Station and according to him on 15th of December, 1999 he was serving in Vehicle No.2 of Sardarnagar Police Station. On that day at 9.25, P.I. Vachhani had come and he had brought appellant No.1 with him, the place where appellant No.1 had thrown muddamal was to be shown. Therefore, in his vehicle, P.I. Vachhani, two panchas and other staff members of the Police were started. They reached near T.B. Hospital and appellant No.1 stated to stop the vehicle and thereafter appellant No.1 stated that there was a heap of garbage where there were babul trees and he had thrown muddamal there. Thereafter, with the panchas and along with him other staff members started searching muddamal and from the heap of broken cup and saucers, one plastic bag was found containing golden ornaments. Those golden ornaments he entrusted to P.I. in the presence of Panchas. Thereafter, P.I. Vachhani called goldsmith and the ornaments were weighed. He described the ornaments found. He stated that police recorded his statement and he identified appellant No.1 in the court. He also identified golden ornaments. In his cross-examination he stated that the golden ornaments were to be seized and, therefore, panchas were called and along with panchas, they had been to near T.B. Hospital. He saw ornaments immediately finding out the bag. He denied that on finding out the ornaments immediately they returned to the Police Station. He stated that after weighing and after making panchnama they returned. He denied that he did not go to that place. He stated that the place where the ornaments were found is a open place. Near that place on road there was traffic of vehicles. He denied that at that place he only saw plastic bag and did not see golden ornaments. He stated that he gave golden ornaments to PI and PI seized it by panchnama. Except that, he did not know anything.

6.21 PW-22 Exh. 85 Jayantilal Karmanbhai Vachhani is Investigating Officer and the then Senior Police Inspector of Sardarnagar Police Station. He stated that on 10th of December, 1999, B.D. Rana informed him on

telephone that near Galaxy Cinema, Naroda, in Hardik Finance, dacoity was committed, therefore, he visited the place. He recorded the complaint of Harshadbhai Baldevbhai Patel as stated by the complainant. He stated that Exh. 26 complaint was in the hand writing of his Writer Jagatsinh. He stated that whatever stated in the complaint was correct. Complainant subscribed his signature in the complaint in his presence and he also signed the complaint. Thereafter with the report, complaint was sent to Police Station for registration of crime. He produced on record that report at Exh. 86. He took over the investigation and drawn the panchnama of scene of offence which is at Exh. 45. Panchas signed that panchnama in his presence. He also signed the panchnama. During this panchnama, one revolver and fired cartridges four in number were seized. One misfired cartridge, one handkerchief and one wrist watch were also seized. The said muddamal was found opposite Gujarat Agro Industries and from the office of the complainant, for which one common panchnama was drawn. The place of offence was shown by the complainant. The accused Yashwant Samji Kadam and Surendrakumar Krishanlal Chaudhary beaten by the public and, therefore, they were admitted to Civil Hospital. He also recorded the complaint of appellant No.1 under Section 323 of the Indian Penal Code, which complaint was in the hand writing of his Writer. The said complaint was recorded as stated by appellant No.1 Yashwantbhai, appellant No.1 signed the complainant and he also signed, which he produced on record and after resolving the objections of the other side, Trial Judge gave Exh. 87 to the complaint given by appellant No.1. The witness further stated that the complaint at Exh. 87 was sent to Police Station for registration with report at Exh.88. Arrangements were made to record dying declaration of appellants No. 1 and 2 through Executive Magistrate. Their statements were recorded by Executive Magistrate and were kept along with the Investigating papers. From personal search of appellants No. 1 and 2, in the presence of panchas, cash amount of Rs. 800/- and one wrist watch were seized. That panchnama is produced at Exh. 89. Thereafter, he recorded the statements of witnesses and accused were arrested. Appellants No. 1 and 2 were arrested after they were discharged from the hospital and their clothes were thereafter seized by panchnama, which panchnama he produced on record at Exh. 47. Learned APP in the deposition of this witness, corroborated the police statement of the other concerned witness. In his cross-examination, he denied that Mahendrabhai did not produce any jeep. He denied that the same panchnama was not drawn by him in the presence

of panchas. He denied that he did not record the statements of the witnesses as per the say of the witnesses. In cross-examination for accused Nos. 1 2, 6, he stated that he did not take written note of the information which he received from PI, B.D. Rana. He stated that at this juncture he could not remember whether B.D. Rana informed him that whether some persons were arrested or some persons were absconded. He stated that the complaint was recorded as per the statement of the complainant. He admitted that in the complaint the role of Appellant Nos. 1 and 2 is not separated. He voluntarily stated that complainant was not indicating him by name. He admitted that no test identification parade in respect of appellants No. 1 and 2 was done. He stated that now the appellants No. 1 and 2 were apprehended was not known to him because he was not present at that time but Police Sub-Inspector Mr. Rana informed him about this. He denied that the arrest of appellants No. 1 and 2 was made at the instance of complainant falsely. While recording complaint Exh. 26, complainant did not say where the accused were. Only after recording of the complaint, he came to know that where the accused were. Appellant No.2 was arrested on 12th of December while appellant No.1 was arrested on 14th December. Accused Nos. 1 and 2 were injured and that information was received by him on the same day. He stated that even injured persons can be arrested, he arranged police escort in the hospital during treatment which appellants No.1 and 2 had taken. He denied that because accused Nos. 1 and 2 were not involved in this offence and, therefore they were not arrested on the same day. He denied that after giving complaint at Exh. 26, complainant was frequently visiting him. Where appellants No. 1 and 2 were apprehended, there were hutments. He denied that appellants No. 1 and 2 had fighting with their neighbour hutmen. He denied that the persons intervened and therefore appellants No. 1 and 2 got injuries. He denied that appellants No. 1 and 2 beaten by Police and to avoid implication of police, appellants No. 1 and 2 were arrested. He denied that B.D. Rana informed him that appellants were beaten heavily by police. He denied that arrest panchnama in respect of accused was not drawn. In para-9 he admitted that he visited the office of the complainant, but he did not obtain any finger prints because Forensic Science Laboratory Expert stated that there were no finger prints available in the office. In para -10 of the cross, he denied that he fabricated the evidence about treatment which appellants No. 1 and 2 were taken in civil hospital. He stated that appellant No.1 gave his complaint in Hindi at Civil Hospital. He registered as

N.C. case on strength of this complaint. He stated that he did not know whether the appellant No.1 was suffering from grievous hurt. In para -11 he denied that he was previously known to Harshadbhai and that Harshadbhai was known as bobi boss in his area. In para 12 he stated that the gold ornaments which he seized he did not identify the ownership. He denied that appellant No.1 stated that he had concealed ornaments near the Gujarat Agro. He admitted that in his investigation, it came out that some persons were running and after those persons a crowd of public was running and the persons running ahead were apprehended. He also admitted that the persons who were running ahead were beaten by the crowd of persons. He denied that the persons running ahead of public crowd, were not accused Nos. 1 and 2. He denied that the panchnama at Exh. 50 was drawn at Police Station. He denied that he did not weigh the gold ornaments through goldsmith. He denied that the said gold ornaments were not the muddamal of the dacoity crime in this case. He admitted that from where the ornaments were found in a open place and the public had access to it. In para 13 he denied that he did not seize the clothes of the appellants. In para 14, he stated that the copy of the complaint was not given to the complainant. He stated that about the ownership of the ornaments, he did not try to obtain details of ownership. He stated that all the details which complainant gave in the complaint was recorded by him and nothing was left out which complainant stated. He denied that he prejudicially investigated the offence.

6.22 PW-23 Exh. 103 Balvantsinh Dalpatsinh Rana was the then Police Sub-Inspector of Sardarnagar Police Station and on 10thof December, 1999 at about 13.00 hours he was present in Police Station and he was informed by PSO of Sardarnagar Police Station by telephone that at Naroda near Galaxy Cinema, a dacoity was committed and they should reach there immediately. He came to know on reaching there that five unknown persons committed dacoity in Hardik Finance and had run away towards Naroda Crossing in a jeep. The public chased those persons and, therefore, along with those persons and staff, he went towards Naroda Crossing. When he reached at the Naroda Crossing, he found that there were two persons lying on the road towards Gujarat Agro Industries in injured and bleeding condition. From the persons gathered there, he came to know that the persons lying there were the persons who committed the dacoity. One country revolver was lying near one person. He was also informed that public had beaten these two persons and ran away. In the meantime, one police van came and those two persons who

were injured were shifted to the hospital in mobile van. Thereafter, Police Inspector Mr. Vachhani was informed and he reached at the spot. He started further action. Vachhani informed him from the hospital that the injured persons were named as Yashwant Samji Kadam and Surendrakumar Krishanlal Chaudhary. As per the directions of PSI Vachhani he investigated at Kalol Uttam Guest House, etc. He had been to Bombay and house of appellant No.1 was searched in the presence of panchas, and that panchnama is produced by him at Exh. 104. He identified appellants No.1 and 2 to be the persons lying near the Gujarat Agro Industries. In his cross-examination, he stated that he did not make any entry of Vardhy received from the Sardarnagar Police Station. He denied that he had no any personal knowledge. He did not record anything about information which he received. He denied that PSO of Sardarnagar Police Station gave information to him that how those two persons were injured, which he came to know from the crowd. In para-3 he denied that he did not go to Bombay and did not draw the panchnama at Exh. 104. He denied that appellants No. 1 and 2 were lying on the road in injured condition. He stated that those appellants were entrusted to him by none nor he made arrangements to shift them to the hospital. He denied that those persons were not identified by anybody before him. In para 4 he stated that he did not conduct any test identification parade and in para 5 he stated that in his investigation it came out that no evidence was found that the accused were gathered at one place and discussed anything.

7. This is all the evidence of the prosecution.

8. Learned Advocate Mr. R.M. Agrawal placed on record Written Contentions in 20 pages which is taken on record and considered. Mostly, in respect of the appeal he stated that the identification before the Court is the weakest kind of evidence in absence of test identification parade during investigation and, therefore, identification is not proved. He stated that there are contradictions between complainant and the substantial evidence of the complainant and between PW-2 Gajrajsinh Raghunathsinh Solanki, PW-3 Atul Sakarchand Patel and PW-4 Jigger Arvindbhai Patel and complainant. These contradictions indicate that complainant is liar and his evidence should not be believed even for a moment. He stated that complainant is not corroborated by his complaint and therefore also his evidence should not be believed. It is stated that the discovery panchnama is not proved. Firstly the story cannot be believed that appellant No.1 was carried in a jeep and

secondly prosecution failed to prove exact words stated by the accused before the panchas. Further, he stated that recovery is not made by appellant No.1, but recovery of muddamal was made by one constable from heap of garbage, which is a open place and public had access to that place. It is stated that, therefore, the discovery of muddamal at the instance of appellant No.1 is not proved beyond doubt by the prosecution. It was stated though the appellants were found on 10th of December, 1999, but the Investigating Officer did not arrest them at that time and appellants were arrested only after they were discharged from the hospital. It is contended that the police could have arrested appellants No. 1 and 2 during the period they were under treatment at Hospital. This shows that the whole case is concocted. It was submitted that police has not attached case diaries with the papers which is mandated not only by this court but by the Hon'ble Supreme Court as well. It was contended that the Investigating Officer did not investigate to find out that the muddamal ornaments were belonging to complainant and others. There is no evidence in this respect and therefore also doubt is created in the evidence of prosecution. It was stated that even the Investigating Officer did not investigate that the amount of about Rs. 2 lacs alleged to have been robbed from complainant and his Manager were actually was with the complainant. Manager PW-3 Atul Sakarchand Patel stated that he obtained the amount of Rs.30,000/- from the bank which were snatched by the accused, but this was also not confirmed during investigation by the Investigating Agency that in fact P.W.3 obtained that amount from bank on that day. In fact, it is stated that appellants No.1 and 2 were beaten by the Police and just to avoid difficulties and involvement, this false case is concocted against present appellants. The complainant should not be believed because in his deposition he identifies the muddamal, which was robbed from PW-2 Gajrajsinh, PW-3 Atul Sakarchand and PW-4 Jigger Arvindbhai also. How can a complainant identify that muddamal and this fact would go to show that the case is concocted. It was contended that on probability also the story of prosecution is not believed because it cannot be believed that after robbing the complainant and his party, dacoits ran out of the office and stopped jeep through aiming revolver against jeep driver and that too was seen by the complainant and party who ran out of the office soon after the dacoits left, and the story that the complainant and his party along with crowd chased the said jeep and the accused, appears to be unnatural and not believable. In this regard also there are contradictions amongst victims, witnesses who were

robbed. Neither complainant in the complaint nor any of the witnesses gave the description of any of the accused in their statements before the Police so as to corroborate the identification of the appellants by the witnesses before the Court and in absence of identification parade and in absence of due description given in the complaint or statements, identification before the court is the weakest kind of evidence and cannot be relied upon. Even identification of ornaments by all concerned witnesses is not proved. It is also to be taken note of that no cash amount was recovered from the accused. It is stated that on the same set of evidence, some accused are acquitted and present appellants are convicted which is not permissible. It is stated that the Police did not also adhere to the directions of the Apex Court given in the case of D.K. BASU vs. STATE OF W.B., as reported in (1997) 1 SCC 416. It was, therefore, stated that Appeal be allowed and appellants be acquitted. Learned Advocate Mr. Agrawal relied upon bulk of decisions of various courts including Apex Court to substantiate his contention.

9. Learned APP Mr. H.L.Jani opposing Appeal stated that the evidence of PW-1 Harshadbhai Baldevbhai Patel, PW-2 Gajrajsinh Raghunathsinh Solanki and PW-3 Atul Sakarchand Patel is reliable evidence and along with these witnesses, the evidence of discovery as well as evidence of police officers who found appellants No. 1 and 2 near the Gujarat Agro Industries is supporting and corroborating evidence, and no fault can be found on appreciation of this evidence. In the evidence of complainant and other witnesses they have categorically stated that the appellant No.1 aimed revolver at the temple of the complainant and appellant No.2 aimed knife at the abdomen of the complainant. Panchnama of scene of offence Exh. 45 is also a corroborative piece of evidence whereby a revolver along with fired four cartridges were found. Even independent witness PW-5 Nikhilbhai Ranchhodbhai Patel supports the prosecution case to the extent that dacoity was committed in the office of the complainant though he turned hostile on other aspect. Learned APP also relied upon certain decisions which will be discussed at proper place.

10. Having heard learned counsels of both the sides and having gone through the record of the case entirely, it is necessary that this court must undertake thorough exercise of appreciation of evidence afresh and come to an independent conclusion considering the contentions raised in this Appeal. Therefore, thorough scrutiny of the evidence of each of the witnesses and the documents

produced on record was undertaken by this court. Learned Counsels for the parties took this court to each line of the evidence of the witnesses recorded by the Trial Court and the documentary evidence. Written submission made by learned Advocate for the appellant in 20 pages was also taken into consideration.

11. Having appreciated the evidence on record, the case of prosecution can be divided in three phases. First, the incident which took place at Galaxy Complex in the office of the complainant and second phase is the fact that present appellants found lying in injured condition near the Railway Crossing of Naroda. These two phases include identification of the accused appellants before the court, in absence of any test identification parade held by the Investigating Agency. The third phase is in respect of discovery of ornaments at the instance of appellant No.1. The evidence of the prosecution is required to be analyzed with reference to these three phases which prosecution proposed to establish and the learned Trial Judge held that prosecution was able to prove its case.

12. Before entering into the discussion, it is required to be made clear that what is the meaning of contradiction in criminal trial and which contradictions would vitiate trial so as to disbelieve the prosecution case. This is required to be observed that much is said against the complainant to brand him as a liar relying upon some contradictions shown by learned Advocate for the appellants. It must be borne in mind that the material contradictions which affects the prosecution case only would vitiate the trial while inconsistencies, exaggerations and embellishment made by the witnesses must not weigh with a court of fact in appreciating the evidence in a criminal trial. In the matter of LEELA RAM vs. STATE OF HARYANA, as reported in 2000 SCC (Cri) 222 in para 12 the Apex Court observed as under :

> "12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied,

it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.".

The Apex Court further observed referring to the matter of APPABHAI vs. STATE OF GUJARAT, in para-13 that the court should also appreciate the evidence in criminal trial keeping in mind the hard realities of life. Civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilance. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties, they should not involve themselves. The Supreme Court further quoted the observations of Appabhai vs. State of Gujarat, as reported in AIR 1988 SC 696 that the course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reached in an unusual manner. In para-13 in the matter of Leela Ram (supra), the Apex Court quoted further the observation of the Apex Court in Appabhai vs. State of Gujarat (supra) that the Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses if they are otherwise trustworthy.

Therefore, the court must endeavour to find out and sift grains from chaff and for the alleged inconsistency, witnesses cannot be branded liars and their evidence cannot be rejected.

12.1 In recent judgment of the Bench of Hon'ble Three Judges of the Apex Court in the matter of KRISHNA MOCHI v. STATE OF BIHAR, as reported in AIR 2002 SC 1965, the Supreme Court reiterated again that the maxim "falsus in uno falsus in omnibus" has no application in India and

the witnesses cannot be branded as liars. It is the duty of the Court to separate grains from chaff. It would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. This replies to the argument of learned counsel for the appellants that some of the accused are acquitted on same set of evidence. In para 75 of the said decision of Krishna Mochi vs. State of Bihar (supra), the Apex Court observed that a witness may not stand the test of cross-examination which may be sometime because he is a bucolic person and is not able to understand the question put to him by the skillful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. In para-76 of the said decision, it was further observed that in a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case.

12.2 The present case for which vehement argument is advanced to brand the complainant to be a liar and investigating agency alleged to have concocted the case, the evidence is required to be appreciated in the above mentioned guidelines as indicated by the Apex Court. While appreciating the evidence on record, PW-1 Exh. 25 Harshadbhai Baldevbhai Patel stated in natural way that how along with his two employees and a friend PW-2 Gajrajsinh Raghunathsinh Solanki were sitting in his office, in which he was doing the business of financing and in broad day light at about 1.30 p.m. five persons forcibly entered in his office and keeping them in fear with revolvers and knives and amount of Rs. 1,70,000/lying in a drawer of table of the office were taken out and how they were pushed to confine in a bath room. There is no way how this story of complainant narrated by him in his deposition appears to be improbable. There is no reason at all at least brought on record as to disbelieve this aspect of the story as narrated by the complainant in his complaint. The reason which is advanced in cross-examination by defence for

disbelieving the complainant and filing false complaint by him, is in respect of the debt, which was incurred by the complainant, and since the complainant did not intend to discharge his creditors, this story was concocted by him. This reason for concocting story by complainant, to a prudent person is not acceptable to come to a conclusion that on this account the complainant would file a false complaint of dacoity and would go through rigmarole to chase dacoits upto Railway Crossing of Naroda. Except that, nothing is found in cross-examination as to disbelieve the complainant. On the contrary, a theory is advanced that in fact the complainant had no such amount of Rs. 1,70,000/- and for that a cross is conducted in paras 16 and 17 of the deposition of the complainant that how the amount of Rs. 1,70,000/- was with the complainant and whether PW-3 Atul Sakarchand Patel and PW-4 Jigger Arvindbhai Patel were his employees. It must be borne in mind that there cannot be evidence of evidence tendered in the court. It is one thing that the witness for the reasons may not be creditworthy and disbelievable, but a witness cannot be said that because there is no evidence of whatever he deposed before the court, he should not be believed. Only because during investigation it could not be found out that how the amount of Rs. 1,70,000/- was lying with the complainant, the complainant cannot be branded as a liar. It is well to remember that neither the Investigating Agency nor the Trial Court was conducting a tax assessment proceedings so as to bring the accounts how the complainant was having the amount. The fact which is established is that, five persons forcibly entered in the office of the complainant and looted including gold ornaments. In this respect evidence of prosecution must be believed and the say of the complainant is creditworthy and reliable. This is so because the story is found probable on appreciation and that there is no reason that why the say of the witnesses in this respect should not be believed. Learned Advocate for the appellants argued that the complainant is not corroborated by the First Information Report which is submitted before the Court. While going through the cross-examination of the complainant entirely, nowhere it is found that the complainant stated something contradictory to the complaint he filed. It is not expected from witness to reproduce before the Court with comma and full-stop of the complaint filed by him, and then and then it can be said that he is corroborated by his First Information Report. On the contrary, it is found that whatever is conveyed by the complainant in complaint at Exh. 26 is conveyed in his deposition at Exh. 25. Learned Advocate for the appellants attempted

to use First Information Report to be substantive piece of evidence. This is not permissible. True it is that, First Information Report can be used for corroboration and contradiction. If any contradiction is found and proved by the defence during cross-examination, then it must be taken that complainant is not corroborated by the First Information Report he filed earlier. Be there any contradiction between what is stated in the First Information Report and in deposition of complainant, it would be the duty of the defence under Section 145 of the Evidence Act to bring it to the notice of the complainant and prove that contradictions. It is not found that any contradiction is proved in this manner.

12.3 Learned APP Mr. Jani rightly pressed into service a decision of the Apex Court in the matter of GEORGE AND ORS vs. STATE OF KERALA AND ANR., as reported in AIR 1998 SC 1376, wherein the Apex Court disfavoured the approach of the Trial Court in dealing with FIR construing the same to be substantial evidence.

12.4 Therefore, it cannot be said that complainant is not corroborated in material particulars with the First Information Report filed by the complainant.

12.5 The fact of committing dacoity in the office of the complainant is corroborated by other three eye witnesses, who are also victims of the incident. They are PW-2 Gajrajsinh Raghunathsinh Solanki, was present in the office, PW-3 Atul Sakarchand Patel, Manager of the complainant who during incident entered in the office with amount of Rs. 30,000/- which were robbed from him and PW-4 Jigger Arvindbhai Patel, an employee of complainant. There is no contradiction brought about by the defence in cross-examination of any of these three witnesses with reference to their statements given to the police. Therefore, the fact is established that they fully supported the prosecution case without any improvement or contradiction. Even while appreciating the evidence of these three witnesses along with the evidence of complainant, no material contradiction could be indicated as to disbelieve any of these witnesses. The story which these three witnesses also said is not improbable. It is not improbable that complainant and party came out soon after the dacoits left the office and saw dacoits aiming revolver at one jeep driver and ran towards Naroda Railway Crossing. This is not the event which would not happen in ordinary course of events nor the testimony of these four witnesses which is interwoven and intertwine is not creditworthy, would be shaken on account of the fact that each witness did not state that

how each of them chased the dacoits upto Railway Crossing from the Office of the complainant. On the contrary, very truthful witnesses say that they boarded whatever vehicles available with them and chased the said jeep. The said statement is creditworthy and on this count only it could not be said that the complainant is a liar and that the remaining witnesses PW-2 Gajrajsinh Raghunathsinh Solanki, PW-3 Atul Sakarchand Patel and PW-4 Jigger Arvindbhai Patel should not be believed. It cannot also be said that the complainant should not be believed because he identified the muddamal which was robbed from PW-2, PW-3 and PW-4. It must be borne in mind that the crime was committed in the presence of the complainant and he was well aware that what was robbed from which person. To brand the witness as a liar on this count would be fatal to criminal justice system itself. Investigating Officer Jayantilal Karmanbhai Vachhani, PW-22 Exh. 85 further supports and corroborate the say of the complainant when Investigating Officer PW-22 deposes that he recorded the complaint of the complainant as per his say and he identified the complainant before the Court. Not only this, but the panchnama of scene of offence at Exh. 45 which is amply proved by PW-22 Investigating Officer and panch PW-6 Manojkumar Nanumal Sindhi supports the say of the complainant as well as PW-2 Gajrajsinh Raghunathsinh Solanki, PW-3 Atul Sakarchand Patel and PW-4 Jigger Arvindbhai Patel. It is not understood that how the running panchnama of scene of offence prepared by the Police right from the office of the complainant to Naroda Railway Crossing where appellants No. 1 and 2 were found, was so unnatural that the whole prosecution case would be vitiated. It is to be noted that perhaps the places of offences are two in the prosecution case, one is office of the complainant while the second is Gujarat Agro Industries near Naroda Railway Crossing. Drawing of panchnama of both the places together is not impeachable fact to discredit the Investigating Officer or the witnesses involved in the said panchnama. Panch PW-6 Manojkumar Nanumal has materially supported the said panchnama. By this panchnama it is proved that a revolver was found near Naroda Railway Crossing including five cartridges. Through this panchnama, one bag, knife, etc. were recovered by the Police. One cannot imagine that the Investigating Officer as well as complainant would plant these things at the office of the complainant and near Railway Crossing only because to involve appellants No.1 and 2 in this crime. This evidence is impeccable and lends supports to the victims and the eye witnesses. Thus, first phase of the prosecution case is amply proved by the evidence led by prosecution and as

reappreciated above.

13. The second phase which includes finding of appellants No. 1 and 2 in injured condition at Naroda Railway Crossing is also established by PW-1 to 4 and other police witnesses. Those police witnesses are independent witnesses. Those witnesses are PW-19 Babubhai Shakarbhai Desai Exh. 68, Dilipbhai Eknat Patil, PW-20, Exh.69 and PW-23 Balvantsinh Dalpatsinh Rana, Exh. 103. PW-23 Exh.103 Balvantsinh Dalpatsinh Rana was PSI at the relevant time of Sardarnagar Police Station. While he was at Kubernagar Chowky, he received the information about the incident and immediately reached at the office of the complainant where he found that the dacoits had absconded towards Naroda Railway Crossing. Therefore, he reached near Naroda Railway Crossing and found appellants No. 1 and 2 in injured condition and a revolver was lying there. In a mobile van, these two persons were sent to Civil Hospital. While PW-19 Babubhai Shakarbhai Desai, as per the instructions received from PW-23 Balvantsinh Dalpatsinh Rana, reached at the spot and found both the appellants lying in injured condition near Gujarat Agro Industries. While PW-20 Exh.69 Dilip Eknath Patil was a Constable serving in a mobile van of Sardarnagar Police Station and on receiving message from the control section, reached at Naroda Railway Crossing with the persons of surveillance squad, found Mr. Rana there and two appellants in injured condition near the Gujarat Agro Industries. All the three persons are independent witnesses and they have no any axe to grind against the appellants. This establishes the fact that after committing dacoity at the office of complainant, dacoits went towards Naroda Crossing but Crossing being closed, getting down from the jeep, they started running towards Chhiloda but both the appellants were caught by the public and were beaten. A lame defence is placed in this regard by the defence side that the appellants were residing in huts near Gujarat Agro Industries and in a fighting between hutmen, they were injured, but this defence is improbable and disbelievable for the simple reason that there is nothing on the record that the appellants were the residents of huts near the Gujarat Agro Industries. On the contrary, in a complaint at Exh. 87 given by appellant No.1 he has categorically stated that he was resident of Bombay and as per the instructions received from the Investigating Officer, PW-23 Balvantsinh Dalpatsinh Rana, visited the house of the appellant No.1 at Bombay and searched the said house. In these circumstances, there is no explanation that how appellants No. 1 and 2 were found at Gujarat Agro Industries in injured condition, except

the evidence of the prosecution witnesses that they were chased by the crowd, apprehended to be dacoits and were beaten. So, the second phase is also satisfactorily established and proved beyond doubt by the prosecution.

14. In respect the important aspect of the prosecution case on which learned Advocate for the appellants vehemently argued was about identification of appellants in the court by the witnesses. Learned Advocate for the appellants relied on certain decisions i.e. (i) in the matter of BUDHSEN AND ANOTHER vs. STATE OF U.P., as reported in 1970 (2) SCC 128; (ii) in the matter of BHURE KHAN vs. STATE OF MADHYA PRADESH, as reported in AIR 1982 SC 948; (iii) in the matter of THE DELHI ADMINISTRATION vs. BAL KRISHAN, as reported in AIR 1972 SC 3; (iv) in the matter of CHANDRAN vs. STATE OF KERALA, as reported in AIR 1990 SC 2148; (v) in the matter of JAHAGIR vs. STATE OF HARYANA, as reported in 1997 CRI. LJ 48; and (vi) in the matter of JANG SINGH vs. STATE OF RAJASTHAN, as reported in 1984 CRI. LJ 1135. These are the cases of their own facts. It is well to remember that in all cases it is not necessary to hold test identification parade. The purpose of test identification parade is nothing but to lend credence to the identification of accused by the witness in the court. Though, ordinarily, test identification parade if practicable, should be held by the Investigating Agency but when trial is not solely rests on identification of the accused and even if the case rests only on identification of the accused, when identification of the accused in the court first time by witnesses is found creditworthy on appreciation of the evidence of such witnesses, then such evidence should be acted upon and the defect of the investigating agency must not be credited to the accused in these circumstances. In this case, all the four witnesses noticed accused for considerable time. The offence was committed in broad day light. There was no attempt on the part of the accused to conceal or hide their faces and figures. The dacoits forcibly robbed witnesses No. 1 to 4. Not only that but independent witnesses PW-19 Babubhai Shakarbhai, PW-20 Dilip Eknat Patil and PW-23 Balvantsinh Dalpatsinh Rana, corroborated in respect of identification by these witnesses in respect of appellants No. 1 and 2. It is not at all unnatural to come to a definite conclusion that the incident which occurred in a manner as aforesaid must have endured indelible impression of dacoits in the mind and brain of the witnesses, and when in these circumstances, without test identification parade, the witnesses have identified the appellants No. 1 and 2 before the Court, they must be held to be reliable and

creditworthy in totality of the circumstances and evidence on record. It is noteworthy that the fact lends credence to the witnesses that out of 8 accused, before the court, only the present appellants were identified. Mainly on this count, the other accused were acquitted by the trial court. Had the appellants concocted the case and the identification, they would have attempted to involve more persons than two out of 8 accused available in the dock before the Court. The independent witnesses PW-19 Bababhai Shakarbhai Desai, PW-20 Dilip Eknat Patil and PW-23 Balvantsinh Dalpatsinh Rana, as above said, have nothing against the present appellants and they also identified these appellants to be the persons lying near the Gujarat Agro Industries and, therefore, identification before the Court in these circumstances is a reliable evidence and must be held worthy of credit. Learned APP has rightly pressed into service some decisions of this Court as well as of the Apex court. In the matter of GEORGE vs. STATE OF KERALA, as reported in AIR 1998 SC 1376. In respect of test identification parade, the Apex Court in para 25, observed as under :

"25. That brings us to the question whether the ground canvassed by the trial court for rejection of her evidence regarding identification of the appellants, whom she, admittedly, did not know from before, as the assailants are improper or not. So far as the first ground is concerned, law is well settled that identification of an accused in Court is the substantive evidence of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in court."

14.1 Thus, when the evidence of identification before the court is admissible and on appreciation is found creditworthy, the prosecution case cannot be thrown away on the ground that investigating agency failed to hold test identification parade.

14.2 Similarly, this Court in the matter of SHANUBHAI H. VEDAVA VAGHARI vs. STATE, as reported in 1999 (1) GLR 818, in paras 12 and 17 observed as under :

"12. It has been submitted on behalf of the accused before this Court that it would not be possible for any person and in that matter even for the complainant and his wife Nayanaben when

neither of them knew him before the date of incident to identify him in the court. According to her submission it was dark midnight and the complainant and his wife could not have proper opportunity to see and remember the figure of the accused persons. According to her submission, no detailed description of the accused person was given by the complainant and his wife at the earliest possible time. Hence, in absence of test identification parade the learned Additional Sessions Judge ought not to have relied upon the evidence of the complainant and his wife Nayanaben for convicting the present accused. She submitted that there was no reason for differentiating the present accused from the accused who was acquitted by the Court. In support of her submission, she has made reference to the following decisions of the Apex Court :-

(i) Budhsen & Anr. v. State of U.P., in AIR 1970 SC 1321.

(ii) Harnath Singh v. State of M.P., reported in AIR 1970 SC 1619.

(iii) Wakil Singh v. State of Bihar, reported in AIR 1981 SC 1392.

(iv) Mohanlal Gangaram Gehani v. State of Maharahstra, reported in AIR 1982 SC 839, and

(v) Bollavaram Pedda Narsi Reddy & Ors. v. State of A.P., reported in AIR 1991 SC 1469.16

"17. In the last mentioned decision in the cas of Bollavaram Pedda Narsi Reddy (supra), the facts of the case would indicate that there was no natural light available and street light was at a distance from the place of occurrence. In that background, it has been observed that when no natural light was available and street light was at a distance, it would be unlikely that the eye witness by momentary glance of the assailants who surrounded the victim had a lasting impression and the chance of identifying the assailants without mistake. It has been observed that the credibility of the

evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression. It might be at once noted from the facts of the present case that there are number of circumstances which would indicate that the complainant and his wife Nayanaben had quite sufficient opportunity to observe particular dacoit/s when the crime was committed and memorize the impression of such dacoit/s in the context of what happened, in the context of how they acted, in the context of what weapons they held, in the context of what role he/they then played. Besides, there is sufficient evidence to corroborate the ocular account of the complainant and his wife Nayanaben in the form of recovery panchnama, as aforesaid. In that view of the matter, when the evidence of the eye witnesses inspires confidence and when learned Additional Sessions Judge has observed them giving evidence before him and when he found the present accused having been without hesitation pointed out by both, the complainant and complainant's wife, there is no reason why this Court should differ from the trial Court's conclusion."

14.3 The facts of the above said case is almost similar to the facts of this case.

14.4 In yet more decision of the Division Bench of this Court, in the matter of STATE OF GUJARAT vs. LUHAR MAHENDRA HARJIVAN, as reported in 1999 (2) GLR 1086, in respect of absence of test identification parade this Court observed in para-13 as under :

"13 Another aspect that requires to be considered is that from the brief-case, a jeans pant was found which was allegedly sold to the accused by witness - Himatlal, Exh. 42. This witness states that at about 12.30 p.m., the accused came to his stall which is near Wankaner Railway Station. He was wearing a chocolate coloured pant and a bush shirt with green lining. His clothes were dirty. He identifies the accused and states that the accused then told him

that he is salesman of incensed sticks, he has only one pair of clothes which have gone dirty and, therefore, he wants to have another pair of clothes. He wanted a pant and then after taking measurement, he showed to him a blue coloured jeans, which the accused purchased for Rs. 50/-. The accused also showed to him banian, towel, napkin, etc., purchased by him from other place from his bag (Theli - a carry-bag normally made of cloth popular in the region). The accused also told him that he was proceeding to Gondal and inquired if any train to Gondal was available. He identifies muddamal article No.19, which is the jeans recovered from the accused at the railway station from the brief-case. This witness is not believed because during cross-examination, he stated that many customers had purchased from him between the time of purchase by the accused and recording of his (witness's) statements by the police and that he has no other special identification mark to identify that jeans. Here again, in our opinion, there is no reason to disbelieve this independent witness. He may be having many customers, but a business man can normally be expected to identify his customer within few days and, therefore, unless some other material aspects are shown to doubt the veracity of the witness, the deposition of such witness could not have been thrown away only on such count.

14.5 Thus, in these facts and circumstances of the case, the contention that in absence of test identification parade, the identification of appellants No. 1 and 2 before the Court is weakest kind of evidence and no reliance can be placed in this evidence must be negatived. There is nothing on record to disbelieve 7 witnesses, four victims and 3 independent witnesses, identifying only two persons out of 8 accused, to be persons who took part in committing dacoity especially when these witnesses are found credible and reliable in all other aspects and they must be given weightage in respect of identification of the appellants before the court even if no test identification parade is held by the investigating agency.

14.6 The third important phase and aspect of the prosecution case is discovery of gold ornaments at the instance of appellant No.1. Material witnesses are PW-8 Exh.49 Rameshkumar Ramlalit Thakore, a panch of discovery panchnama of Exh. 50, PW-21 Exh. 70, Maheshbhai

Vashrambhai Rabari, driver of the police vehicle, in which the accused was taken to near T.B.Hospital at his instance and Investigating Officer - PW-22 Exh. 85 Jayantilal Karmanbhai Vachhani. While appreciating the evidence, it is established that appellant No.1 stated before panchas that he should be carried and he should show the place where he had placed the muddamal. Therefore, at the instance of the accused appellant No.1 the Investigating Officer, both the panchas of panchnama at Exh. 50, took the police vehicle near the TB hospital where the appellant No.1 stated that in a heap of garbage, he had thrown muddamal and, therefore PW-19 Babubhai Shakarbhai Desai and other police staff searched muddamal and found one plastic bag and confirmed from the accused that whether the same was muddamal. Appellant No.1 confirmed it. The ornaments were weighed and panchnama was prepared. There is nothing on the record to disbelieve these witnesses. True it is that, the ornaments in fact are found out by PW-21 Maheshbhai Vashrambhai Rabari and police staff, but this was so because the accused - appellant No.1 was not in condition to move around with the police staff for searching muddamal from the heap of garbage. The evidence of these three witnesses in this regard is natural and creditworthy. Only because the muddamal was found from open place where public had access and a road was adjoining on which the traffic remains, are not the facts to vitiate the evidence of discovery. What is required and the object and essence of discovery is well explained by the Apex Court in the matter of PANDURANG KALU PATIL vs. STATE OF MAHARASHTRA, as reported in 2002 SAR (Criminal) 167, the Supreme Court observed that the essence of Section-27 of the Evidence Act, 1872 is that it was enacted as a proviso to the two preceding sections, Sec. 25 and 26 which imposed a complete ban on the admissibility of any confession made by an accused either to the Police or to any one while the accused is in police custody. The object that making a provision in Section 27 was to permit a certain portion of the statement made by an accused to a police office admissible in evidence whether or not such statement is confessional or non-confessional. The ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. Such fact can be discovered by the police pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. At the same time, recovery or even production of object by itself need not necessarily result in discovery of a fact. Relying upon a decision of Privy Council, in the matter of Pulikuri

Kottaya and Ors. vs. Emperor, reported in AIR 1947 Privy Council 67, the Supreme Court stated that what is material is a statement of the accused while in custody and the second aspect is fact of discovery in pursuance of such statement of the accused. The fact discovered would not be as equivalent to the object produced but the fact discovered would mean the knowledge of the accused about what he stated before the Police.

14.7 Thus, even if the discovery is made from the open place, reliance can be placed on the evidence of PW-8, PW-21 and PW-22 as to discovery of ornaments vide panchnama Exh.50, it must be borne in mind that what is discovered is not only the ornaments but what is discovered is the knowledge of the accused - appellant No.1 who had thrown ornaments in heap of garbage near TB hospital and, therefore, the evidence of discovery inspires confidence. Learned APP pressed into service two decisions on this aspect. In the matter of BODHRAJ vs. STATE OF J & K, as reported in (2002) 8 SCC 45, the Supreme Court in para 18 observed that recovery of an object is not discovery of fact envisaged in Section 27. the fact discovered envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. It is laid down by the Supreme Court in Para-18 of this decision is completely fulfilled in this case. The accused stated before the panchas that he was going to show the place where he placed the muddamal and muddamal was found from the heap of garbage, near T.B. Hospital where accused appellant led panchas and police party. In other decision cited by the learned APP Mr.Jani in the matter of STATE OF MAHARASHTRA vs. SURESH, as reported in (2000) 1 SCC 471, in para 26, the Apex Court observed that "three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that

the concealment was made by himself.

15. Next it was contended that police did not attach the case diaries as directed by this Court as well as Supreme Court. Decision of Supreme Court in the matter of D.K. BASU vs. STATE OF W.B., as reported in (1997) 1 SCC 416 was also pressed into service by learned Advocate for the appellants that the mandate given by the Supreme Court was not complied with by the Police. Certain decisions on how to appreciate the evidence by the Appellate courts are also pressed into service, but the discussion of this aspect is not necessary because this Court has undertaken independent scrutiny and appreciation of evidence afresh. In pursuance of directions given by the Courts in judicial pronouncements, if the diaries are not attached by the I.O., the trial would not vitiate. It may result in action being taken for contempt. Even if the mandates are not complied with of the Apex Court engrafted in D.K. Basu's case, the result would be contempt action, but on that ground, criminal trial itself would not be vitiated. Criminal Appeal is to be decided on the evidence recorded and proper appreciation of the same. In this respect, learned APP pressed into service the decision of the Apex Court in the matter of SHAMSHUL KANWAR vs. STATE OF U.P., as reported in AIR 1995 SC 1748, wherein in para-9 the use of the diary and limit of the same by the accused is stated. It is also observed by the Supreme Court in this decision that the failure to keep a diary as required by Section 172, Cr.P.C. cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to a limited extent.

16. In the present case, there is no iota of fact by which police officer would be required to be confronted by the police diaries. The evidence given by the Investigating Officer does not invite any fact which would be required to be looked into by the court through the diaries he kept. On the contrary, the case on appreciation of evidence is found trustworthy and credit worthy and investigation is found on greater extent satisfactory.

17. For the reasons stated above, the learned Trial Judge came to eminently just conclusion to convict the accused appellants No.1 and 2 as above said, no

interference at all is required by this Court on re-appreciation of evidence and considering even the contentions raised on behalf of the appellants.

18. In the result, in view of the above discussion, this Appeal fails and stands dismissed.

(J.R. Vora, J.)

p.n.nair